In the Supreme Court of the United States.

OCTOBER TERM, 1903.

GEORGE W. BEAVERS, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES marshal. } No. 535.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF APPELLEE.

STATEMENT OF THE CASE.

This case is brought here by the appellant for the purpose of reviewing a final order of the circuit court of the United States for the southern district of New York, denying an application for a writ of habeas corpus and a writ of certiorari ancillary thereto. At the time of the filing of the petition for these writs, to wit, on the 10th day of November, 1903, the appellant, George W. Beavers, was in the custody of William Henkel, United States marshal for the southern district of New

York, under a warrant of removal issued by Hon. George C. Holt, United States district judge for the southern district of New York (Record, pp. 4 and 5), under and pursuant to the provisions contained in section 1014 of the Revised Statutes of the United States, which reads as follows:

> SEC. 1014. For any crime or offense against the United States the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

The various proceedings preliminary to the issuance of such warrant of removal, and the application to the circuit court for said writs of habeas corpus and certiorari, were substantially as follows:

On the 23d day of July, 1903, the United States grand jury for the eastern district of New York returned an indictment against the appellant, George W. Beavers, wherein he was charged, under six different counts, with having violated section 1781 of the Revised Statutes of the United States. (Record, pp. 14 to 20, inclusive.) The indictment charges that George W. Beavers, being an officer of the Government of the United States, to wit, Superintendent of Salaries and Allowances in the office of the First Assistant Postmaster-General of the United States, unlawfully did take and receive certain moneys from the Edward J. Brandt-Dent Company for procuring and aiding to procure for said company a contract from the Post-Office Department of the United States Government.

On the 14th of day August, 1903, a bench warrant was duly issued by said court for the arrest and apprehension of the said George W. Beavers, which bench warrant was returned on the 3d day of September, 1903, by the United States marshal for said district with the indorsement thereon that the defendant could not be found. (Record, p. 13.) Proceedings were thereupon instituted in

the southern district of New York under and pursuant to section 1014 of the Revised Statutes, for the purpose of securing the arrest and removal of said George W. Beavers from said southern district of New York to the eastern district of New York to answer the charges contained in said indictment.

On the 3d day of September, 1903, Frank E. Little, a United States post-office inspector, made a sworn complaint in writing before Samuel M. Hitchcock, a United States commissioner in and for the southern district of New York, which complaint in substance charged, upon information and belief, the commission by the defendant in the eastern district of New York of the crime defined by section 1781, Revised Statutes. This complaint further alleged with great particularity the sources of the inspector's information upon which said complaint was based. (Record, p. 11.)

A certified copy of the indictment was attached and made a part of the complaint before the commissioner, who thereupon issued a warrant, reciting the substance of the complaint, and directing the arrest of the said George W. Beavers, and his production before him to be dealt with according to law. (Record, pp. 6 and 7.) The defendant was thereafter, to wit, on the 8th day of September, 1903, duly arrested by the United States marshal, William Henkel, and taken before the said commissioner for examination. (Record, p. 7.) Upon the hearing before the commissioner, the Govern-

ment introduced evidence identifying the accused as the person described in and charged in the indictment, and also a certified copy of the indictment, and thereupon rested its case. (Record, p. 25.)

Counsel for the defendant moved to dismiss the proceedings upon the ground that the indictment was insufficient, and that the Government had failed to make out a prima facie case (Record pp. 34 and 35), which motion the commissioner denied.

The defendant thereupon called certain witnesses, who testified with reference to efforts which the defendant had made for the purpose of securing the attendance of certain witnesses, and attempted to attack the proceedings which had taken place before the United States grand jury for the eastern district of New York preliminary to the finding of the indictment. There was no evidence offered by the defendant for the purpose of showing that a crime had not been committed, nor was there evidence offered for the purpose of showing that the defendant George W. Beavers was in no way concerned in the commission of the crime charged in the indictment.

At the conclusion of the taking of the testimony before the commissioner, a motion was made to dismiss the proceedings for the reasons set forth in the motion (Record, pp. 99, 100, and 101), which motion was denied, and the commissioner, having found that there was probable cause for believing

the defendant guilty of the offense charged in the indictment, thereupon committed the defendant to the custody of the United States marshal for the southern district of New York to await the order of removal of the district judge (Record, p. 102). Application was thereupon made by the district attorney to the United States district judge for the southern district of New York for an order for the removal of the defendant under and pursuant to section 1014, Revised Statutes. An order was thereupon made and a warrant signed by the judge on the 10th day of November, 1903, for the removal of the defendant to the eastern district of New York. (Record, pp. 4 and 5.)

But before said warrant of removal was executed the appellant on the same day presented his petition to the circuit court of the United States for the southern district of New York for a writ of habeas corpus and certiorari, setting forth the foregoing facts, and a copy of the order of removal, which he alleged to be illegal and in violation of his constitutional rights. (Record, pp. 1, 2, 3, and 4.) The matter was heard before the Hon. E. Henry Lacombe, United States circuit judge, on the 11th day of November, 1903. And it appearing to said court that the restraint of the petitioner was not unlawful, an order was entered denying appellant's application for said writs (Record, p. 106), from which order the defendant appealed to this court, the defendant being admitted to bail pending the decision.

OFFICE OF THE WRIT OF HABEAS CORPUS.

The precise question to be decided upon this appeal is, whether the United States district judge for the southern district of New York, who made the order for the removal of the defendant, had jurisdiction to make it, and if he had, the question whether upon the merits he ought to have made it is not one which can be reviewed by means of the writ of habeas corpus. (Greene v. Henkel, 183 U. S., 249, 261.)

A writ of *habeas corpus* and *certiorari* ancillary thereto can not be used to perform the office of a writ of error. *Ornelas* v. *Ruiz*, 161 U. S., 502; *Terlinden* v. *Ames*, 184 U. S., 270; *Wright* v. *Henkel*, 190 U. S., 40, 57; *Greene* v. *Henkel*, 183 U. S., 249.

A writ of *certiorari* does not enlarge the office of a writ of *habeas corpus*, but is employed in connection with such writ in order that the court may ascertain from the record whether *jurisdictional questions* have been disregarded, and the defendant is restrained of his liberty without due process of law.

Ex parte Lange, 18 Wall., 163.
Ex parte Virginia, 100 U. S., 339.

When, therefore, the writ of *certiorari* is resorted to as ancillary to the writ of *habeas corpus*, the examination, while confined to jurisdictional questions, necessarily takes a wider range, and it often becomes a matter of some difficulty to distinguish the jurisdictional questions involved from those questions involving mere irregularities or erroneous rulings of the committing magistrate upon the

admission or rejection of evidence. In view of the various contentions of counsel for appellant, we are, perforce, compelled to discuss many questions which we do not regard as properly before this court for its consideration upon an appeal of this character for the sole purpose of showing that such questions are not jurisdictional in their nature. The questions which we regard as jurisdictional will first be considered.

POINTS AND AUTHORITIES.

I.

The indictment sufficiently charges the defendant with the commission of a crime against the United States under section 1781 of the Revised Statutes.

The indictment in this case is framed under section 1781 of the Revised Statutes, and contains six separate and distinct counts. After setting forth, with great particularity, that George W. Beavers, during all of the times mentioned in the indictment was an officer of the Government of the United States, to-wit: Superintendent of Salaries and Allowances in the office of the First Assistant Postmaster-General, in the city of Washington, in the District of Columbia, and that said Beavers was charged, among other things, with the consideration of allowances for miscellaneous and incidental expenditures, and with the procuring of contracts and undertakings with and from persons proposing to furnish supplies to said Post-Office Department involving the expenditures of moneys

by the United States, charged that said George W. Beavers did unlawfully enter into a fraudulent agreement, contrary to his duties as such officer, to procure and aid in procuring for the Edward J. Brandt-Dent Company, a contract for said company with the Government of the United States for furnishing certain automatic cashiers to the Post-Office Department, and that said Beavers, as such officer, did unlawfully take and receive certain moneys from said company for procuring and aiding to procure a contract for said company with the Post-Office Department of the United States for the purchase of automatic cashiers.

Section 1781, Revised Statutes, so far as the same is applicable to the case at bar, is as follows:

> * * * any officer or agent of the Government who, directly or indirectly, takes, receives, or agrees to receive, any money, property, or other valuable consideration whatever, from any person for procuring or aiding to procure any contract * * * from the Government, or any department thereof * * * for any person whatever * * * shall be deemed guilty of a misdemeanor and shall be imprisoned not more than two years, and fined not more than ten thousand dollars.

It is respectfully submitted that the indictment here under discussion charges the defendant, George W. Beavers, in the language of the statute above quoted, with having committed such offense. And while the indictment was attacked on the

hearing before the commissioner, and in the petition for writ of habeas corpus, on the ground that it was fatally defective and bad for duplicity, it would seem from an examination of appellant's brief that such points are not seriously urged upon the consideration of this court.

II.

It is contended, however, that there was no jurisdiction to apprehend the accused because the complaint for removal was jurisdictionally defective in that it was made entirely upon information and belief, without alleging any proper sources of information and the grounds of complainant's belief, and without averring any reason why the person or persons having knowledge of the facts alleged was not secured.

The complaint alleges among other things as follows:

"Frank E. Little, being duly sworn, says that he is a United States post-office inspector, and further says on information and belief that," etc. And after stating the facts by proper allegations, wherein the certified copy of the indictment is expressly referred to and made a part of the complaint, the complaint further alleges (Record, p. 11):

> Deponent further says that the sources of his information are the official documents with reference to the making of the said contract, and the said transactions on file in the records of the United States of America and in the Post-Office Department thereof, and letters and communications from the

Edward J. Brandt-Dent Company with reference to the said contract, and from the indictment, a certified copy of which is referred to in said affidavit as Exhibit A, and the bench warrant therein referred to as Exhibit B, and from personal conversations with the parties who had the various transactions with the said George W. Beavers in relation thereto; and that his information as to the whereabouts of the said George W. Beavers is derived from a conversation had with the said George W. Beavers in said southern district of New York in the past few days, and from the certificate of the United States marshal for the eastern district of New York indorsed on said warrant.

FRANK E. LITTLE.

Sworn to before me this 3d day of September, 1903.

SAML. M. HITCHCOCK,
U. S. Comm.

It is respectfully submitted that the above allegations sufficiently set forth the source of complainant's information, and the facts upon which his belief was based. We assert that a certified copy of the indictment alone would in itself be sufficient information upon which to predicate a complaint of this character.

The case of *Rice* v. *Ames*, 180 U. S., 371, 374, is relied upon by the Government as sustaining this contention:

> The first assignment of error is to the effect that the commissioner issuing the war-

rant had no jurisdiction, because the complaint of Greer was upon information and belief, and not such as was required by the treaty or by section 5270 of the Revised Statutes. The first two complaints which were dismissed, as well as the first count of the complaint under which the proceedings were finally had, were obviously insufficient, since the charges were made solely upon information and belief, and no attempt was made even to set forth the sources of information or the grounds of affiant's belief. This is bad, even in extradition proceedings, which are entitled to as much liberality of construction in furtherance of the objects of the treaty as is possible in cases of a criminal nature. Nor is it saved by the fact that Greer described himself as Government detective for the province of Ontario, and duly authorized by the Attorney-General to act as the agent of the Government to prosecute extradition proceedings. Ex parte Smith, 3 McLean, 121, 135; Ex parte Lane, 6 Fed. Rep., 34; In re Young Mfg. Co. (1900), 2 Ch., 753.

A citizen ought not to be deprived of his personal liberty upon an allegation which, upon being sifted, may amount to nothing more than a suspicion. While authorities upon this subject are singularly few, it is clear that a person ought not to be arrested upon a criminal charge upon less direct allegations than are necessary to authorize the arrest of a fraudulent or absconding debtor. *Smith* v. *Luce*, 14 Wend., 237;

Matter of Bliss, 7 Hill, 187; *Proctor* v. *Prout*, 17 Mich., 473. So, too, in applications for injunctions, the rule is that the material facts must be directly averred under oath by a person having knowledge of such facts. *Waddell* v. *Bruen*, 4 Ed. Chan., 671; *Armstrong* v. *Sanford*, 7 Minnesota, 49.

We do not wish, however, to be understood as holding that, in extradition proceedings, the complaint must be sworn to by persons having actual knowledge of the offense charged. * * * If the officer of the foreign government has no personal knowledge of the facts, he may with entire propriety make the complaint upon information and belief, stating the sources of his information and the grounds of his belief, and annexing to the complaint a properly certified copy of any indictment or equivalent proceeding which may have been found in the foreign country, or a copy of the depositions of witnesses having actual knowledge of the facts, taken under the treaty and act of Congress. This will afford ample authority to the commissioner for issuing the warrant.

III.

Section 1014 of the Revised Statutes, when properly construed, is intended, in case of indictment, to furnish the Government a convenient and summary method for securing the appearance of the defendant before the United States court in which the indictment is found.

In re Ellerbe, 13 Fed. Rep., 530.

U. S. v. *Yarborough*, 122 Fed. Rep., 293.

It would seem from a careful analysis of this act of Congress that the courts, in construing its various provisions, have failed to recognize the true purpose and meaning of the law when applied to those cases in which indictments have been returned against defendants by a Federal grand jury. We take the position that after a Federal grand jury has found a valid indictment against a person, charging him with the commission of a crime in violation of the laws of the United States within that judicial district, that there is no law of Congress which for a moment contemplates that such defendant, if he should flee to some other district or be found in some other State or district, that he would be entitled, as a matter of right, to a preliminary examination for the purpose of determining whether or not there was probable cause to believe that he was guilty of the offense charged.

The Constitution of the United States, in article 4, section 2, paragraph 2, provides as follows:

> A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.

Under and pursuant to this provision of the Constitution, Congress in 1793 passed an act (1 Stat., 302) requiring the executive of any State or

Territory, upon the production of a copy of the indictment, to surrender such fugitive to the demanding State. This law is found in section 5278 of the Revised Statutes, and is as follows:

> Whenever the executive authority of any State or Territory demands any person as a fugitive from justice of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory.

In view of this constitutional provision, and the act of Congress above quoted, the proposition that

the United States Government intended to make it more difficult to secure the arrest and appearance for trial of offenders against its laws than in case of interstate rendition is startling, to say the least. The question, therefore, arises as to whether Congress has done so by enacting the law contained in section 1014 of the Revised Statutes. It will, I think, be admitted that Congress has the power to provide that a bench warrant for the arrest of a person indicted for violating a law of the United States might be served in any judicial district of the United States in which the defendant should be found. But instead of passing such a law, Congress enacted:

> For any crime of offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail * * * where he may be found, *and agreeably to the usual mode of process against offenders in such State*, and at the expense of the United States, be arrested, imprisoned, or bailed as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district

where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

The first question which presents itself for consideration is, What interpretation and meaning is to be given to the phrase "agreeably to the usual mode of process against offenders in such State" in a case such as the one at bar, where an indictment has already been found? What is the mode of process in the State of New York in a case in which a person has already been indicted?

The State of New York is divided into counties, and in all or nearly all of these counties there is a county court having jurisdiction of all crimes and offenses committed against the laws of the State in said counties. If a crime or offense be committed in one county, and the evidence is presented to the grand jury in that county and an indictment returned against the offending parties, upon such indictment the county court issues its bench warrant, and the sheriff of that county is thereupon authorized to proceed into any other county in the State where the person indicted happens to be found, and thereupon arrest him and take him before the court of the county in which the indictment was found, to be there imprisoned or bailed under the direction and authority of the court, as the case may be.

But such defendant, although arrested in some other county in the State, is not entitled to have

an examination either at the place where he is arrested or in the county where the indictment was found. So it will be seen that the usual mode of procedure in the State of New York, where this defendant was apprehended, is not to allow a committing magistrate to inquire anew into the facts which were before the grand jury that found the indictment. And it seems unreasonable to contend that the Federal Government, by the enactment of this law, intended to throw about itself obstacles which it expressly provided against in the case of intra-State extradition.

It appearing, therefore, that, according to the usual mode of process against offenders in the State of New York, in a case in which an indictment had already been found the person indicted would not be entitled to a preliminary examination, the question naturally arises as to whether there be any other interpretation of this law which would be at the same time in full accord with the facts presented in this case. The law says that the offender may be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. This action, of course, is required to be done "agreeably to the usual mode of process against offenders" in the State of New York. Does not this language, therefore, simply mean that the commissioner is empowered by this law to arrest and imprison or bail the offender, in accordance with the laws of the State of New

York, for trial before the United States court for the eastern district of New York? In other words, is it reasonable to suppose that the phrase "agreeably to the usual mode of process against offenders in such State" must necessarily embrace everything which is ordinarily connected with a preliminary examination, and that too in a case in which a preliminary examination would not be allowed under the laws of the State of New York, and in which a preliminary examination is absolutely unnecessary?

And again, while the language of this section is sufficiently broad and comprehensive to allow a preliminary examination in a case in which a preliminary examination would ordinarily be allowed under the laws of the State of New York, the mere fact that such language is used, which is sufficiently broad to cover a case of arrest before indictment in which a preliminary examination is usually given as a matter of right, ought not to be construed as conferring the right to a preliminary examination in a case where no such examination could be demanded under the laws of the State of New York, namely, after the finding of an indictment.

Our contention, therefore, is, that in a case where an indictment has been found by a Federal grand jury of some other district, that this law under discussion simply authorizes a United States commissioner to do that which in the absence of the law he would not have the power to do,

namely, to issue his warrant for the arrest of the offender, and to imprison the offender to await the order of removal subsequently provided for, or to bail the offender, as the case may be, for trial before the court of the United States in which the indictment was found, all of which he must do in accordance with and agreeably to the usual mode of process against offenders in the State of New York, but that this law does not reasonably or necessarily require him, the commissioner, to hold a preliminary examination in the ordinary sense and acceptation of such a proceeding.

There is nothing said about a preliminary examination in the law, and every provision and phrase of the law could be given full force and effect as applied to all of these acts of the commissioner without requiring him to hold a preliminary examination. Such examination ought to be regarded as having been dispensed with by reason of the action of the grand jury that returned the indictment. This method of procedure, while giving full force and effect to all of these various provisions of law under discussion, necessarily contemplates that the commissioner should find that a valid indictment existed in the court of the demanding district, and that the offender was the person named in the indictment. The finding of these facts is essential to authorize the commissioner to hold the offender for trial, as is apparent from the most casual examination of the law, just as the sheriff in making an arrest in the

State of New York would be required in the first place to have a valid warrant for the apprehension of the person charged, and in the second place it would be necessary for such sheriff to ascertain the identity of the person to be arrested.

These things are necessary to confer jurisdiction or authority upon the sheriff to make a legal arrest, and it is, of course, necessary in a proceeding of this character that the commissioner should have a certified copy of the indictment in order that he might know that the preliminary hearing was unnecessary. And he should likewise require evidence or information that should satisfy his mind that the person named in the indictment was the identical person brought before him. Being satisfied upon these two points, his duty under the statute is clear, namely, to hold the prisoner for trial before the United States court for the eastern district of New York in proper bail, and in default of bail to commit him to the custody of the marshal to await the action of the United States judge of the district upon an application by the United States attorney for the warrant of removal.

In the case of *Greene* v. *Henkel* (183 U. S., 258), Mr. Justice Peckham, in delivering the opinion of the court, said:

> From these facts it is apparent that the question is not before us whether the finding of an indictment is in a proceeding under section 1014 of the Revised Statutes

> conclusive evidence of the existence of probable cause for believing the defendant in the indictment guilty of the charge therein set forth. The district judge in this case held that it was not, and sent the case back to the commissioner, before whom evidence was thereafter taken upon the subject, and a decision arrived at after considering all the evidence in the case. We are not, therefore, called upon to express an opinion upon the question. Upon all the evidence taken before the commissioner he has found that probable cause existed. We think that a fair interpretation of the language used by the district judge in granting the application for the warrant of removal shows beyond question that, from the evidence taken before the commissioner, the judge was of opinion that there existed probable cause, and that the defendants should, therefore, be removed for trial before the court in which the indictment was found.

While this court refused to pass upon the question as to whether the finding of an indictment, in a proceeding under section 1014 of the Revised Statutes, is *conclusive evidence of the existence of probable cause* for believing the defendant in the indictment guilty of the charge therein set forth, according to our view of this proceeding considered in the aspect of the case now under discussion, it would seem that the *question of probable cause* is not in issue, for if this proceeding in a case where an indictment has been found be re-

garded as merely a summary method for securing the removal or appearance of the defendant before the proper Federal court for trial, *and as it were a substitute for a provision of law which would allow a bench warrant, when an indictment is found, to run into any district in the United States, it would seem that the question of probable cause is immaterial.*

Viewed in this light, we contend that the moment the commissioner became satisfied of the identity of the defendant, and that a valid indictment had been found against him in the eastern district of New York, that it was the commissioner's duty to require him to enter into a recognizance for his appearance before such court for trial, and in default to commit him to the custody of the marshal to await the action of the district judge on an application for removal; *that such action of the commissioner was not required by reason of the fact that the indictment showed the existence of probable cause, but rather by reason of the fact that the statute provides that method for securing his appearance for trial.*

This construction of section 1014 is neither novel nor is it without the support of judicial authority. In the case of In re Ellerbe (13 Fed., 530), decided in the circuit court for the eastern district of Missouri in 1882, Circuit Judge McCrary, in considering this section of the statute, said:

> It may, for the purposes of this case, be assumed that the district judge could inquire into the question of the jurisdiction of the

> court in Arkansas to try the prisoner for the offense charged. If such be the law the jurisdiction clearly appears. I do not think, however, that in a case such as this the district judge can go further and inquire into the question of the guilt or innocence of the prisoner. There may be cases in which the inquiry might properly extend to an examination into the question of probable guilt, but if so they are cases where there has neither been a preliminary examination nor an indictment in the district where the offense was committed, nor an order for the arrest of the prisoner by a court of the United States of competent jurisdiction, and sitting in that district. See opinions of Mr. Justice Miller and Judge Love 1 Woolw., 422.

In the case of the *United States* v. *Yarborough*, 122 Fed., 293, decided by the district court for the western district of Virginia in April, 1903, Judge McDowell distinctly recognizes the construction of the statute for which we are contending. His language is as follows:

> PROCEEDINGS BEFORE THE COMMISSIONER.
>
> While there are numerous officers given authority by section 1014 to hold the preliminary hearing of one arrested for removal to another district, it is preferable that, after the arrest, the accused should be taken before the nearest United States commissioner. In all cases the commissioner must first be reasonably satisfied as to the identity

of the prisoner; and, if the prisoner denies that he is the person accused of the offense, opportunity should be allowed both sides for a full investigation of this question.

If the identity of the prisoner is not denied, or has been established, the commissioner should then (in a bailable case) fix the amount of bail to be taken for the appearance of the accused before the court or magistrate before whom he is to be tried. If the accused is charged with a nonbailable offense, or can not give bail, or refuses to give it, the commissioner should commit him to await the action of the district judge of this district (or possibly of any Federal judge having jurisdiction in this district) as to awarding a warrant of removal.

PROBABLE CAUSE.

The decided cases exhibit much diversity of opinion as to the powers and duties of commissioners, when holding these preliminary examinations, other than as to deciding the question of identity and as to taking bail. Much of this confusion might perhaps have been obviated by classifying the cases which may come before the commissioners. The right of the commissioner to require evidence of probable cause of guilt, for instance, would seem to depend on the character of the case before him.

(*a*) *Previous indictment.*—If the accused had been previously indicted in the district in which he is wanted, it seems to me that

it would be *supra dignitate* for a commissioner (or it might be a justice of the peace) to examine anew the grounds on which a grand jury returned the indictment. Usually the accused has had an examining trial and been held over before his case is laid before a grand jury. And the indictment is a complaint, nearly always founded on the testimony of witnesses, made on the oaths of the grand jurors.

(*b*) *Previous preliminary trial.*—If the papers laid before the commissioner here show that the accused has had, in the district from which he fled or in which he is wanted, a preliminary hearing, and had been held over, I do not perceive any right on his part to demand another preliminary trial on the question of probable cause to believe him guilty. The former trial was of this question, and the commissioner who held that trial was convinced that there was probable cause.

(*c*) *Bench warrant without indictment.*—Where affidavits have been laid before a Federal judge charging one with criminal contempt of court, for instance, it is not unusual that an attachment or a bench warrant issues. If the accused has fled to some other district it is not uncommon practice that copies of the affidavits and bench warrant are certified and sent to the district where the accused is supposed to be. Such cases are of rare occurrence; but if they do occur here the commissioners are advised

not to hear evidence from the accused offered to show innocence of the charge. It may be safely presumed that the judge issuing the bench warrant has examined the question and decided that there was probable cause to believe the accused guilty before having the papers certified to another district.

(*d*) *Mere verified complaint before foreign magistrate.*—It may be the case that the action against the accused in the district in which he is wanted has gone no further than the making of a complaint against him before a committing magistrate, on which a warrant of arrest may or may not have been issued. In this case I am inclined to the opinion that the accused is entitled to have the commissioner in this district hear evidence of probable cause of believing him guilty before he is required to give bail to appear before the trial court or is committed awaiting the issue of a warrant of removal. But the verified complaint is prima facie true, and further evidence from the Government should not be required unless evidence offered by or in behalf of the prisoner has created a substantial doubt as to the existence of probable cause to believe him guilty.

The case at bar clearly comes within subdivision (*a*), entitled "Previous Indictment," and the question of the existence of probable cause by virtue of the finding of the indictment is eliminated from the commissioner's consideration. In such

a case, while the commissioner sits as a committing magistrate, the presentation of a certified copy of the indictment at once precludes the necessity of an investigation as to the existence of probable cause, in the sense in which that expression is ordinarily understood as applied to a preliminary examination. The commissioner's inquiry is confined to the validity of the indictment upon its face, which is a question of law, and the identity of the person apprehended, which is a question of fact. In other words, his duties are similar to those of a sheriff in executing a warrant of arrest. If the warrant is valid upon its face and the person arrested is the one named and described in the warrant, the sheriff's custody of the prisoner is lawful and will not be disturbed on a writ of habeas corpus. The question of probable cause does not enter into one any more than the other.

The Government's case, however, is not based upon the foregoing contention alone, but upon the further proposition that if the defendant be entitled to a preliminary examination after indictment under the proceedings instituted pursuant to section 1014, that a certified copy of the indictment, together with proof of identity of the defendant, constitutes a prima facie case sufficient to sustain a finding by the commissioner of the existence of probable cause.

IV.

If, in a proceeding under section 1014, the defendant after indictment is entitled to a preliminary examination for the purpose of establishing probable cause, a certified copy of the indictment and proof of identity of the defendant are sufficient to make out a prima facie case sufficient to sustain a finding of the commissioner of the existence of probable cause.

This proposition assumes that in a proceeding instituted under section 1014 of the Revised Statutes that the party arrested, both before and after indictment, is entitled to a preliminary examination, and that the Government is required to make out a prima facie case upon which a finding of probable cause could be predicated.

This question is not a new one, but, on the contrary, has been up for consideration before nearly every district court of the United States, and the courts are practically unanimous in holding that upon proof of defendant's identity, and the production of a certified copy of the indictment, sufficiently charging the commission of a crime by the accused within the district to which he is sought to be removed, that probable cause has been established sufficiently strong to sustain an order of removal.

In this connection it will be observed that the record fails to disclose any testimony offered in behalf of the appellant for the purpose of showing *directly* that the crime charged was not committed, or if committed that the defendant

himself was in no manner concerned in its commission. An attempt was made, however, to attack the proceedings had before the grand jury prior to the finding of the indictment, evidently for the purpose of proving *indirectly* that the crime charged had not been committed. But this feature of the case will be considered in a subsequent proposition.

Counsel for the appellant rely upon certain decisions by Judge Brown, formerly United States district judge for the southern district of New York, in the following cases:

In re Dana, 68 Fed., 891.

United States v. *Greene et al.*, 100 Fed., 941.

United States v. *Greene et al.*, 108 Fed., 816.

Before entering upon a discussion of the many decisions sustaining the contention of the Government under this proposition, we will briefly consider not only Judge Brown's opinions in the cases above referred to, but other opinions of that learned judge in similar cases.

United States v. Greene et al., 108 Fed., 816.

In this case Judge Brown followed the well-established rule that where at the hearing the commissioner had before him any competent legal evidence upon which to exercise his judgment as to whether there existed probable cause, that his finding of fact upon that question could not be reviewed by the court upon an *application for an order of removal.*

In the Green case (108 Fed., 816), at page 819, Judge Brown says:

> Upon the question of the existence of probable cause to believe that an offense has been committed the rule as respects any review of the commissioner's finding is the same whether the questions arise upon an application for removal to another district, made under section 1014, R. S., or upon habeas corpus and certiorari, or an appeal therefrom in cases of international extradition. In all such cases the question upon review never is whether the proof was such as would be required to convict the accused upon a trial by jury; but only as to the existence of any legal evidence before the commissioner upon which he might find that there was reasonable cause to believe that the crime has been committed.

Citing *Bryant* v. *U. S.* (167 U. S., 104), and *Otieza* v. *Jacobus* (136 U. S., 330).

At the bottom of page 819 he further says:

> The evidence receivable in such preliminary examinations is not to be strictly limited by the technical rules applicable upon the final trial.

In the case of In re Price (83 Fed. Rep., 830) Judge Lacombe says:

> The testimony is not strong, but it does tend to show the commission of the offense charged; and under well-settled rules the finding of the commissioner as to probable cause should not be disturbed.

In the case of *Horner* v. *U. S.* (143 U. S., 207) it was held that on a criminal hearing the commissioner has full jurisdiction to decide all questions of

fact for the purpose of the removal of the accused and his decision will not be reviewed on habeas corpus.

United States v. Green, 100 Fed., 941.

As above stated, Judge Brown in the Green cases holds that the commissioner is the judge of the facts. In no part of his opinion does he hold that the indictment is not evidence, but, on the contrary, in the case of *U. S.* v. *Green* (100 Fed. Rep., 941, at p. 943) he says, after quoting In re Dana (68 Fed. Rep.) and In re Wood (95 Fed. Rep., 288):

> That the object of the proceeding is to enable the commissioner to ascertain for himself whether from the proof of facts and circumstances produced before him, there is probable cause to believe the defendant is guilty of the offense charged; that the mode of proceedings in such cases is precisely the same whether there is an indictment or no indictment (see also *Price* v. *McCarthy*, 32 C. C. A., 162, 89 Fed. Rep., 84, per Wallace, J.); and that an indictment, when offered by the prosecution, is *at best but evidence*, in no way conclusive, and in truth is but secondary evidence (which to a certain extent is admissible on such examinations); and that although the copy of an indictment may be treated as an affidavit, it is nevertheless to be judged by the same rules as other affidavits, and given weight

> only according to the nature and character of its averments, and the facts and circumstances which it sets forth, if any, in a manner sufficient to warrant the conclusion of probable cause to believe the accused guilty.

In the case of in re Wood, cited approvingly by Judge Brown, as above stated, Judge Bellinger states: (95 Fed., 289.)

> The statutes of Oregon have made this indictment evidence in such a case. * * * Under a similar statute in the State of California it was held in *U. S.* v. *Haskins* (3 Sawyer, 270, Fed. case No. 15322) that a copy of an indictment, if uncontradicted, is sufficient proof of probable cause to justify the commitment of the defendant. * * * And in the absence of a State statute of this kind, the general rule in Federal courts undoubtedly is that if the indictment contains allegations sufficient to show that a crime has been committed by the party charged, it is sufficient as a prima facie showing to order a removal if nothing else appears.

From a careful examination of the case of *United States* v. *Green* (100 Fed. Rep., 941) it will be seen that the commissioner on the hearing refused to allow the defendant to put in evidence to rebut the prima facie case established by the prosecution, and it was principally for this reason that Judge Brown refused the order of removal. Had the

commissioner allowed the defense to put in evidence there would then have been "some competent legal evidence before him" *pro* and *con*, and Judge Brown would have been obliged to follow the case of *Otieza* v. *Jacobus*, *supra*, and not have interfered with the commissioner's finding of fact.

And in *Price* v. *McCarthy* (32 C. C. A., 162; 89 Fed. Rep., 84), cited by Judge Brown, a certified copy of an indictment was, at the hearing, offered in evidence, and the circuit court of appeals (Wallace and Shipman, JJ.) raised no question as to its validity or sufficiency as evidence; and again in the case of *U. S.* v. *Price* (84 Fed. Rep., 636) Judge Brown treats the indictment as evidence.

In re Dana, 68 Fed., 896.

And again in the case of In re Dana (68 Fed. Rep. at p. 896) Judge Brown says:

> An indictment found in another district, though not primary evidence of the facts stated in it, may, however, be secondary evidence of a more or less persuasive character. It contains the finding of a body specially constituted by law to inquire into offenses; it is required to be based either upon the examination of witnesses or upon the knowledge of the grand jury itself; it is a record of their presentment or complaint and purports to be made upon oath, and is delivered to the court upon their oath to make true presentments. Beyond that jurisdiction it may, therefore, be received as any complaint on information and belief would be

> received, and its sufficiency should be judged by the same rules. The question of probable cause the magistrate must himself determine from all the facts ascertained by him. The judgment of a foreign grand jury is not to be a substitute for his own. If the narrative of facts contained in the indictment is clear, consistent, and unambiguous in showing the commission of the offense charged, I think it may be regarded as equivalent to a deposition of the facts ascertained by the grand jury upon the sworn examination of the witnesses whose names are indorsed on it; and, as such, sufficient evidence for the issue of the warrant of arrest under section 1014, when evidence of the facts is not conveniently attainable, and, hence, it is also sufficient for commitment if examination is waived or when the averments of the indictment are not contradicted.

Here again he treats the indictment as evidence and states that where it properly charges a crime and is uncontradicted, it is sufficient for commitment. This case was not decided on the question as to the validity of an indictment as evidence, but upon a well-established rule that the indictment, when used in such a proceeding, must properly set forth the necessary averments to constitute a crime. In this case, at page 892, after citing many cases, Judge Brown says:

> The above are the only cases I have found in which the effect of an indictment as evidence is considered. According to them, an indictment in another district, though

admissible as prima facie evidence, is not conclusive and can not shut out evidence for the defendant to show that no offense was committed by him within the district to which removal is sought.

These excerpts would seem to indicate that Judge Brown never intended to be quoted as holding that an indictment could not, *in such a proceeding as the present*, be considered as evidence. From a close examination of his opinion in the Dana case it will be seen that he held, as a matter of law, that the indictment upon which it was sought to remove petitioner was defective. No one denies that it is within the province of a commissioner to test the indictment by reasonable tests as to whether it sufficiently charges a crime; both the commissioner at the hearing and the judge on the application for the warrant of removal may undoubtedly do this. (See In re Corning, 51 Fed. Rep., 205; In re Terrell, 51 Fed. Rep., 213, and many cases therein cited.) If the indictment will stand the test of a demurrer, then it is competent evidence. And if the indictment is competent evidence and alleges facts sufficient to constitute a crime, and the crime is properly charged therein, it is prima facie evidence, and the commissioner is the judge of the facts and his determination can not be disturbed. In *U. S.* v. *Green* (108 Fed. Rep., 816); also Judge Lacombe in the case In re Price (87 Fed. Rep., 830): "Under well-settled the rules finding of the commissioner as to probable cause should not be disturbed."

(See also *Otieza* v. *Jacobus*, supra; *Price* v. *McCarthy*, supra.)

In the case at bar the Government has followed a practice well recognized for many years by the Federal courts in nearly every district in the United States, and while it may be that if it is once admitted that in *all proceedings* under section 1014 that the defendant is entitled to *a preliminary examination for the purpose of establishing probable cause*, that the defendant would be entitled as of right to introduce evidence bearing upon such question, it is sufficient to say that in the case at bar the *appellant did not avail himself of such an opportunity in any direct and proper manner.*

The following authorities are submitted upon the question that a certified copy of the indictment and proof of identity are sufficient to establish probable cause, and authorize a warrant of removal.

In the case of *U. S.* v. *Aaron Burr* (Fed. case No. 14692), Chief Justice Marshall held that on a preliminary hearing probable cause must be shown. "Proof furnishing good reason to believe that the crime alleged has been committed by the person charged, though not sufficient for conviction will suffice for commitment." In this case the defendant was held on affidavits previously used in the State of Louisiana, in the case of Bollman and Swartwout.

In the case of *U. S.* v. *Newcomber* (Fed. case No. 15869), Judge Wilson, in the southern district of Ohio, in 1864, held that a certified copy of an indictment was enough to warrant removal.

In the case of Clark (Fed. case No. 2797), southern district of New York, in 1868, Judge Benedict, on habeas corpus and certiorari, where the United States Commissioner had issued a warrant to arrest petitioner on a charge of conspiring to defraud the United States in the eastern district of Michigan, and petitioner was arrested and brought before the commissioner and demanded an examination, and on examination the evidence consisted of a certified copy of the indictment found against the defendant in the eastern district of Michigan and proof that on said indictment a warrant had issued, held that on such a proceeding the indictment must be considered sufficient unless it is so defective in its material averments that it would be the manifest duty of a court, before it was presented by a grand jury, to decline to take action upon it.

In Federal case No. 730, in re Bailey, circuit court, district of Kansas, in 1869, Judge Love held:

> I hold, as I have always done in cases of indictment, that the prisoner should be brought before me in order that the fact of identity might be inquired into. * * * I hardly suppose we could look behind an indictment. * * *

In *U. S.* v. *Jacobi* (Fed. case No. 15460, district court, western district of Tenn., 1871) Withey, district judge, held:

> My opinion is also that the certified copy of the proceedings of contempt and of the attachment are sufficient to justify not only the United States in making the necessary complaint, but to authorize the issuance of a warrant of arrest by the proper officer *precisely as a certified copy of an indictment would be in any other case of crime.* * * * The papers afford sufficient evidence to authorize his imprisonment. When committed the judge would be authorized to issue a warrant to remove.

Citing *U. S.* v. *Shepard* (Fed. case No. 16273):

In Federal case No. 162, in re Alexander, district court, Massachusetts, 1871, the district attorney applied for a warrant to send the defendant to the district of Louisiana for a trial on a criminal charge, and the defendant was arraigned before the commissioner on complaint, and the only evidence of probable cause was a certified copy of an indictment returned to the circuit court of the United States for the district of Louisiana. The defendant offered no evidence and the warrant of removal was allowed by District Judge Lowell.

In Federal case No. 15313, *U. S.* v. *Hendricks*, in 1872, circuit court in the district of South Carolina, Judge Erskine held, that a United States district judge within whose district is an offender who had

fled from the district in which the offense is triable, may issue a warrant for the arrest and transportation of the offender directly to the other district without his first being committed in the district where he is found.

In Fed. Case No. 2102, in re Buell, on appeal to the circuit court of the eastern district of Missouri, from the district court, 1875, Judge Dillon held that mere technical defects in an indictment should not be regarded, but a district judge who should order the removal of a prisoner when the only probable cause relied on, or shown, was an indictment, and that indictment failed to show any offense against the United States, would misconceive his duty.

In Fed. Case No. 16069, *U. S.* v. *Pope*, in the district court of Massachusetts, 1878, Judge Lowell held—

> It has been seriously doubted whether a copy of an indictment is evidence in such an examination. I decided in Alexander's case, Fed. Case 162, that it is. This is a very convenient decision for the United States and a sound one, but it rests rather on long usage than on any principle of law. In extradition between the United States and other nations copies of the warrants and of the depositions upon which it was founded are made evidence (R. S., 5271); and in extraditions between the States a copy of the indictment is sufficient (R. S., 5278).

From an examination of the foregoing cases it is plain that the courts have all dealt with a certified copy of the indictment in such a proceeding, as evidence, and in all of such cases where the indictment properly charged a crime it was held prima facie evidence. Among the later cases this has been even more positively determined.

See in re Doig (4 Fed. Rep., 193):

> The complaint on which the original warrant of arrest was issued charged the prisoner with the offense of manslaughter on the high seas, but it appears by the commitment, and it is admitted by the district attorney, that the only evidence produced to the committing magistrate was a certified copy of an indictment found by the grand jury for the district of Oregon.

In this case there was no question as to the sufficiency of such indictment as evidence.

In the case of In re Ellerbe (13 Fed. Rep., 530), where the defendant was arrested in Missouri on a warrant issued by the clerk of the circuit court of the United States for the eastern district of Arkansas, which warrant was issued by order of that court in a proceeding against petitioner for contempt, Judge McCrary says, at page 532:

> It is next insisted on behalf of petitioner that he is entitled to a hearing before he can be sent out of the district, and that he has not had such hearing as the law requires. * * * It was the duty of the district judge to enter into such an investigation as

> was necessary to enable him to determine whether the petitioner should be sent out of the district to answer the charge against him. * * * Certain it is that he had a right to inquire into the question of the prisoner's identity * * * it may, for the purpose of this case, be assumed that the district judge could inquire into the jurisdiction of the court in Arkansas to try the prisoner for the offense charged. * * * I do not think, however, that in such a case as this the district judge can go further and inquire into the guilt or innocence of the prisoner. There may be cases in which the inquiry might properly extend to an examination into the question of probable guilt; but, if so, they are cases where there has neither been a preliminary examination, nor an indictment in the district where the offense was committed, nor an order for the arrest of the prisoner by a court of the United States of competent jurisdiction and sitting in that district.

Citing opinions of Mr. Justice Miller and Judge Love (1 Wool., 422), supra.

In the case of *U. S.* v. *Rodgers* (23 Fed. Rep., 658) it is said:

> In the discretion of the judge he may take the indictment as prima facie evidence, etc.
>
> See also *U. S.* v. *White* (25 Fed. Rep., 716).

The case of in re Wolf (27 Fed. Rep., 606) was almost identical with the case at bar. There

the defendant was indicted for a conspiracy to defraud the United States and was arrested in the State of Arkansas for removal to the District of Columbia, and the evidence offered by the Government was a certified copy of an indictment in the District of Columbia and proof of identity. In that case it was held, pp. 608 and 609:

> If the indictment contains allegations sufficient to show a crime has been committed by the party charged, it is the practice of the Federal judges to take the same as a prima facie showing that a crime has been committed at the place alleged, by the party charged; and, if nothing else appears, to order a removal of the party charged.

See also in re Graves (29 Fed. Rep., 66), citing in re Ellerbe (13 Fed. Rep., 530), and other cases.

In the case of *U. S.* v. *Fokes* (53 Fed. Rep., 13), circuit court of appeals, third circuit, it is held:

> We do not doubt that a district court may, in its discretion and in a proper case, order a warrant of removal upon an indictment alone.

This was an appeal from the decision of *U. S.* v. *Fokes* (49 Fed. Rep., 50), where an indictment was admitted as evidence.

See also in re Beshears (79 Fed. Rep., 70), which follows the above cases; also *U. S.* v. *Lee* (84 Fed. Rep., 626, at p. 627).

See also in re Bellknap (96 Fed. Rep., 614), which holds, if an indictment states an offense, it is the plain duty of the judge to order removal.

Doubt should not be solved against the indictment in such a case.

Also in re Richter (100 Fed. Rep., 295), which holds:

> Undoubtedly the indictment is presumptive of probable cause if an offense within the statute is clearly stated, etc.

See also *Green* v. *Henkel* (183 U. S., 249), which holds that there must be some competent legal evidence to show that an offense has been committed over which the court in the other district had jurisdiction, and that the defendant is the individual named in the charge, and that there is probable cause for believing him guilty of the offense charged. At page 262 it holds:

> In our opinion such an indictment is prima facie good, and when a copy of it is certified by the proper officer a magistrate acting pursuant to section 1014 of the Revised Statutes is justified in treating the instrument as an indictment found by a competent grand jury.

The foregoing are substantially all of the decisions on this question in the United States courts, and with all of these decisions before him, Judge McDowell, in the United States district court in the western district of Virginia, on April 7, 1903, decided the case of *U. S.* v. *Yarborough*, in which he holds, at page 297 (122 Fed. Rep., 293):

> If the accused had been previously indicted in the district in which he is wanted, it seems to me that it would be *supra digni-*

> *tate* for a commissioner (or it might be a justice of the peace) to examine anew the grounds on which a grand jury returned the indictment. Usually the accused has had an examining trial and been held over before his case is laid before the grand jury. And the indictment is a complaint nearly always founded on the testimony of witnesses, made on the oaths of the grand jurors.

In view of the foregoing decisions and quotations, it is respectfully submitted that the Government has proved a *prima facie* case by competent legal evidence, and upon the failure of the defendant to rebut said case it was the duty of the commissioner to hold the defendant for removal to the eastern district of New York.

V.

A certified copy of the indictment, together with proof of identity of the defendant, having been offered by the Government, a prima facie case of probable cause was established, and the finding of the commissioner upon this question is not subject to review on a writ of habeas corpus.

This proposition is supported by numerous authorities, but it is only necessary to refer to the opinion of Mr. Justice Peckham in the case of *Greene* v. *Henkel*, 183 U. S., 249, 261.

> Upon this writ the point to be decided is whether the judge who made the order for the removal of the defendants had jurisdiction to make it, and if he had, the question

> whether upon the merits he ought to have made it is not one which can be reviewed by means of the writ of *habeas corpus*.
>
> Jurisdiction upon that writ in such a proceeding as this does not extend to an examination of the evidence upon the merits. The matter for adjudication is similar to that which obtains in cases of international extradition. In such case, if there is competent legal evidence on which the commissioner might base his decision, it is enough, and the decision can not be reviewed in this way. (*Bryant* v. *United States*, 167 U. S., 104.) There must be some competent evidence to show that an offense has been committed over which the court in the other district had jurisdiction and that the defendant is the individual named in the charge, and that there is probable cause for believing him guilty of the offense charged.

This opinion clearly holds that if there is competent legal evidence upon which the commissioner might base his decision the question as to whether upon the merits he ought to have decided as he did is not one which can be reviewed by means of a writ of *habeas corpus*. If, therefore, the certified copy of the indictment, together with proof of the identity of the defendant, is sufficient to make out a case of probable cause, as we have shown under the preceding proposition, the finding of the commissioner that probable cause for believing the defendant guilty of the offense

charged existed would not be the subject of review here, even had the defendant upon the hearing offered evidence for the purpose of disproving the Government's prima facie case.

And while it is true that the defendant would have been entitled to submit such testimony for the consideration of the commissioner, when viewed in this aspect of the case, the commissioner obviously would not be bound to accept the testimony of the defendant in preference to the evidence submitted by the Government. In other words, if the defendant had taken the stand and testified that he was in no way concerned in the commission of the crime charged, and that he was not even in the district at the time referred to in the indictment, while the commissioner would have had the power if he believed that there was want of probable cause from such evidence to discharge the defendant, yet upon the other hand if he believed that there existed probable cause notwithstanding such testimony, his finding upon that fact could not be reviewed in a proceeding of this character. There would still, in the language of Mr. Justice Peckham, have been "competent legal evidence on which the commissioner might base his decision," and that decision would not be subject to review upon a petition for a writ of *habeas corpus*.

VI.

The appellant, in the hearing before the commissioner, did not offer any competent evidence to rebut the case presented by the Government.

We have seen that, having given a case in which there is competent legal evidence upon which the commissioner might base his decision as to the existence of probable cause, that his finding upon that question can not be reviewed by a writ of habeas corpus. The facts in the case at bar show in a most convincing manner that no competent testimony was offered by the appellant at the hearing before the commissioner which tended to establish the want of probable cause. The appellant's whole contention before the commissioner was directed toward an effort to prove that the proceedings before the grand jury which returned the indictment were illegal and void, and that consequently no valid indictment had in fact been returned against George W. Beavers. A brief examination of the record will clearly disclose this fact.

(1) William Kline, sworn for the defense, testified substantially as follows (Record, pp. 35, 36, and 37):

> I am employed as a clerk in the office of Morgan & Seabury, and served a subpœna duces tecum upon Miss Wren for her personal appearance at the examination in this court. I saw her in the district attorney's office, in the post-office building, in the city of Brooklyn.

(2) Edmund H. Driggs, a witness for the defense, testified substantially as follows (Record, p. 68):

> Q. Were you called or subpœnaed to attend at the session of the Federal grand jury in the eastern district of New York in the month of July, 1903?
>
> A. Yes, sir.
>
> Q. Were questions put to you before that body at that time?

The commissioner sustained the Government's objection to this question.

Mr. Steuer, counsel for the appellant, stated during the examination of this witness, as follows:

> We do propose to show what transpired before that grand jury so as to show that there was not any evidence upon which that body could have found an indictment, a legal, valid, lawful indictment against George W. Beavers. We have no other purpose in calling this witness or any other witness who appeared before the grand jury. For that we have the authority of this court in well-considered cases. (Record, pp. 68, 69.)

And again, Mr. Steuer said:

> What I proposed to show was that the testimony given by the witness was illegal, incompetent and irrelevant, and improperly received, and that it in no way gave a foundation for the finding by the grand jury of any fact attempted to be set out in that

indictment, and I understand that you refuse to permit me to show by this witness. (Record, p. 69.)

(3) Harry F. Burns, a witness for the defense, was called, and after certain preliminary questions was asked whether questions were put to him before the grand jury; which question he was not permitted to answer.

Mr. Steuer again said (record, p. 70):

> And we propose to show by this witness that he gave no testimony upon which, either separately or taken in conjunction with all the other testimony before that body, a legal, lawful, or valid indictment could be found against George W. Beavers; and we also propose to show that such testimony as was given by him before that body was illegal, incompetent, irrelevant, and immaterial to the issue then before that body.

Subsequently the same character of testimony was sought to be elicited from each and all of the other witnesses called in behalf of the defendant:

(4) George F. Miller (p. 70).

(5) Amy Wren, a clerk in the district attorney's office (Record, p. 74).

(6) William J. Youngs, United States attorney, Brooklyn (Record, p. 80).

(7) Frank E. Little, post-office inspector (Record, p. 82).

(8) John F. Oldfield, post-office inspector (Record, p. 91).

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It will be observed that all of this testimony sought to be produced in behalf of the defendant, and which the commissioner declined to receive, tended *directly* to impeach the action of the grand jury for the eastern district of New York in finding the indictment; and while such testimony has been received by the court in which the indictment was found, as a basis for a motion to quash the indictment, it is manifest that such testimony ought not to be heard by a United States commissioner who has no power to quash the indictment. The theory of the defense is that such testimony was competent for the purpose of thus indirectly proving a want of probable cause.

Upon that proposition we rely again upon the authority of *Greene* v. *Henkel*, 183 U. S., 249, 261, in which Mr. Justice Peckham said:

> We do not think that under this statute the commissioner would be warranted in taking evidence in regard to the organization of the grand jury which found the indictment, as claimed by the defendants. The indictment is valid on its face; purports to have been found by a grand jury acting in fact as such at a regular term of a district court of the United States, presided over by one of its judges, and hearing testimony in the ordinary way. In our opinion, such an indictment is *prima facie* good, and when a copy of it is certified by the proper officer, a magistrate, acting pursuant to section 1014 of the Revised Statutes, is justified in treating the instrument as an indictment found

> by a competent grand jury, and is not compelled *or authorized* to go into evidence which may show or tend to show violations of the United States statutes in the drawing of the jurors composing the grand jury which found the indictment.
>
> We agree with the district judge that matters of that nature are to be dealt with in the court where the indictment is found, and we intimate no opinion upon the merits of those questions. Whether the defendants have waived the right to raise them, or whether they could waive the same, are also questions that are not before us. They must be raised before and decided by the United States court sitting in the southern district of Georgia, in the first instance, and we express no opinion as to their validity.

So in the case at bar, the question as to whether there was any competent legal testimony presented to the grand jury for the eastern district of New York upon which this indictment is based, is a matter to be dealt with in the court where the indictment was found, and must be raised before and decided by the United States court sitting in the eastern district of New York.

The cases cited by appellant in his brief (p. 28) are all cases of this character, and arose on a motion to quash the indictment before the court in which the indictment was found.

But if we admit, for the purposes of the argument, that the commissioner would have been justified under the law in receiving such testi-

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mony, and that he improperly excluded it, such action upon his part is not sufficient to raise a jurisdictional question. It was at most an error of law which can not be reviewed upon a writ of *habeas corpus*. Suppose the commissioner upon the hearing had excluded certain evidence offered by the defendant which this court might regard as perfectly competent testimony, it certainly could not be successfully maintained that such a ruling by the commissioner would be subject to review upon a writ of *habeas corpus* and a writ of *certiorari* ancillary thereto.

CONCLUSION.

While the Government contends that section 1014 of the Revised Statutes, when properly construed in a case in which an indictment has been found, was intended to furnish the Government with a convenient and summary method for securing the appearance of the defendant before the proper United States court for trial without first resorting to a preliminary examination for the purpose of ascertaining the existence of probable cause, it is of course unnecessary for the Government in this case to rely upon that contention if the other proposition be true, namely, that a certified copy of the indictment and proof of identity of the defendant are sufficient to make out a prima facie case that an offense has been committed over which the court in the other district had jurisdiction, and that probable cause exists for believing the defendant guilty of the offense charged.

This proposition the Government especially relies upon and respectfully submits:

First. That the commissioner and the district judge who issued his warrant of removal, having each determined that probable cause existed, that so long as there was some competent evidence upon which such a finding could be based, that this court ought not to review that question by means of a writ of habeas corpus.

Second. That the evidence offered by the defendant, and rejected by the commissioner, clearly showed that it was not competent evidence for the purpose of rebutting the prima facie case of the Government establishing the existence of probable cause.

Third. Even though the evidence offered by the defendant and rejected by the commissioner was competent, that the ruling of the commissioner was a mere error of law and not reviewable here.

Respectfully submitted.

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